IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 160

MILLER BROTHERS COMPANY,
Appellant,

vs.

STATE OF MARYLAND,
Appellee.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF FOR APPELLANT

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Opinions Below

The opinion of the Court of Appeals of Maryland has not been officially reported. It is printed in the Record (R. 35-44) and reported in 95 A. 2d 286 (1953). The opinion of the Superior Court of Baltimore City has not been officially reported. It is printed in the Record (R. 15-33).

Jurisdiction

The judgment of the Court of Appeals of Maryland was entered on March 11, 1953 (R. 45). The petition for appeal was presented to the Chief Judge of that court on June 4, 1953 (R. 45-46). This court noted probable jurisdiction by

order entered October 12, 1953 (R. 51). The appellant by its pleadings filed in the trial court, by its counsel's oral argument in the trial court and memorandum of law filed therein, and by its appeal papers and brief filed in the Court of Appeals of Maryland and oral argument of its counsel therein, in each and every instance, drew in question the validity of a statute of the State of Maryland on the ground of its being repugnant to the Constitution of the United States, as applied to sales made by appellant. The Court of Appeals decided in favor of the validity of the statute in its application to all sales made by appellant to its Maryland customers. This was a final judgment rendered by the highest court of the State of Maryland. Jurisdiction of this Court to review the judgment on appeal is conferred by 62 Stat. 929, 28 U. S. C. Section 1257 (2). *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282 (1921).

The Question Presented

May the State of Maryland by attaching a motor vehicle found within its borders, compel a Delaware merchant to pay a use tax on all goods sold by it to purchasers residing in Maryland where the merchant's only contacts with Maryland are in (1) advertising in Delaware newspapers and over Delaware radio and television broadcasting stations; (2) using the United States mails to transmit advertising matter to its customers; and (3) occasionally using Maryland highways to make deliveries to customers who reside there.

Statutes Involved

The claim asserted by the State against appellant is based upon the Maryland Use Tax Act (Chapter 681 of the Acts of 1947, as amended). This statute has been codi-

fied as Sections 368-396, inclusive, of Article 81 of the Annotated Code of Maryland (1951 ed.). It incorporates by reference a number of the provisions of the Retail Sales Tax Act (Chapter 281 of the Acts of 1947, as amended) which has been codified as Sections 320-367, inclusive, of Article 81 of the Annotated Code of Maryland (1951 ed.). The statutes pertinent to this appeal are set forth in an appendix hereto.

Statement Of The Case

Appellant, Miller Brothers Company, is a Delaware corporation (R. 10). It has never qualified or registered to do business in Maryland and has no resident agent in that state (R. 14). It is engaged in the retail household furniture business (R. 10). It has only one store, which is located in Wilmington, Delaware (R. 10). It does not maintain any office, branch store, warehouse or other place of business in Maryland (R. 14). It has no salesman or other employee in Maryland (R. 14).

Appellant advertises regularly in daily newspapers published in Wilmington, Delaware, which circulate in some portions of Maryland. It also advertises by radio and television over broadcasting stations located in Wilmington, Delaware. None of appellant's advertising was designed to appeal to out of state business or to Maryland residents, as such (R. 11).

Appellant distributes, by an automatic card mailing system, about four pieces of advertising matter a year. By the very nature of such automatic mailing, these are mailed to everyone who has purchased from appellant and whose name and address are on appellant's records. Although Maryland residents do receive such mailing pieces, no advertising copy is mailed for the specific purpose of attract-

ing Maryland buyers. Appellant has not sent any advertising copy to Maryland buyers alone, and the only advertising copy which these Maryland buyers receive is that which is sent to all customers whose names and addresses are on the records of appellant (R. 11-12).

Most of the merchandise sold by appellant requires personal inspection and selection (R. 12). Appellant maintains no mail-order business and does not accept orders by telephone (R. 12). In all cases the purchaser (whether a Maryland or a Delaware resident) goes to appellant's store in Wilmington, Delaware, and there selects the items which he desires to purchase (R. 12). Deliveries to Maryland purchasers are made in one of the following three ways and no other (R. 12-13):

(1) The article is taken away by the purchaser.

(2) Appellant delivers the article in Wilmington, Delaware, to a common carrier which delivers the article in Maryland to the purchaser. The cost of delivery is borne solely by appellant.

(3) The article is delivered in Maryland to the purchaser, in a motor vehicle owned and operated by appellant, directly from appellant's store, storeroom or warehouse in Wilmington, Delaware, to the residence of the Maryland purchaser. The cost of delivery is borne solely by appellant.

The Proceedings Below

On or about March 10, 1952, the Comptroller of the State of Maryland assessed a deficiency in use tax against appellant in the amount of $356.40. This assessment included use taxes together with interest and penalty alleged to be due on all sales made during the period July 1, 1947, through December 31, 1951, to persons residing in Mary-

land who had used, consumed or stored or would use, consume or store the purchased property in the State of Maryland (R. 12). Sales in which the purchaser took delivery in Delaware were included among those on which the use tax was claimed. Also included were sales where delivery was made in Maryland by common carrier or in appellant's own trucks (R. 12-14).

Appellant, through its counsel, having advised the Comptroller that the Company intended to ignore the assessment, on March 19, 1952, the State of Maryland (appellee here and in the Court of Appeals of Maryland) filed an attachment proceeding in the Superior Court of Baltimore City alleging that appellant was indebted to it by reason of its "failure and refusal to pay legally assessed deficiencies to the said State of Maryland, in Use Taxes justly due and owing, in the full and just sum of Three Hundred Fifty-six Dollars and Forty cents ($356.40)" (R. 1). The court thereupon issued a writ of attachment directing the sheriff of Baltimore City to attach any property of appellant which could be found in the jurisdiction (R. 4-6). The sheriff's return on this writ shows that on April 4, 1952, he seized a station wagon bearing Delaware License No. C 4749 which he appraised at a value of $800 (R. 7).

On March 19, 1952, the same day the attachment proceeding was filed, and in connection with the attachment proceeding, the State of Maryland filed a suit (called in Maryland parlance "the short note case") against appellant in the Superior Court of Baltimore City, Maryland, to recover taxes, interest and penalty alleged to be due in the amount of $356.40 (R. 2). The sheriff of Baltimore City was directed to summon the appellant to appear on a day named in the writ of summons (R. 3-4). The sheriff's return on the writ of summons shows that the appellant was not found within the State of Maryland (R. 4).

Thereafter appellant appeared specially in the attachment proceeding solely for the purpose of protecting its interest in the property attached and petitioned the court to quash the writ of attachment for the following reasons:

> "(a) The use tax which the Plaintiff claims is due and owing by the Defendant to the Plaintiff consists of use taxes which Plaintiff claims the Defendant was required, by the Maryland Use Tax Law [Sections 308 to 337* inclusive of Article 81 of the Annotated Code of Maryland, 1947 Cumulative Supplement (as amended)] to collect and pay to the Plaintiff on sales of certain tangible personal property made by the Defendant in the State of Delaware to Maryland purchasers. The Defendant has not engaged nor does it engage in any local activities in the State of Maryland which could be the basis for such a requirement. If the Maryland Use Tax Law be construed to require the Defendant to make said collections and payments, said Law is void because it violates (i) the due process clause of the Fourteenth Amendment to the Constitution of the United States of America, (ii) Article 23 of the Declaration of Rights of the Constitution of Maryland, and (iii) Section 8 (Commerce Clause) of Article I of the Constitution of the United States of America.
>
> "(b) That the Maryland Use Tax Law cannot properly be construed to require the Defendant to make said collections and payments". (R. 7-8).

The State of Maryland then moved to dismiss appellant's petition on the grounds (1) that collection of sales and use taxes could be contested only by following certain administrative and court proceedings prescribed by the sales

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* These sections were renumbered as section 368-396, inclusive, in the 1951 Edition of the Annotated Code of Maryland, which was published after the trial of this case in the Superior Court of Baltimore City but before the case was heard on appeal in the Court of Appeals of Maryland. Except as specifically noted, the numbering of the 1951 Edition will be used throughout this Brief.

and use tax laws, and (2) that the assessment, collection and payment of the tax involved were authorized and required by Sections 368 through 396, inclusive, of Article 81 of the Annotated Code of Maryland and such authorization and requirement did not violate any provision of the Constitution of the United States of America or the Constitution of the State of Maryland (R. 9-10).

Pursuant to a stipulation (R. 15) signed by counsel for both appellant and the State of Maryland, appellant's petition was considered as having been refiled as a plea in bar in the short note case by appellant appearing specially and solely for the purpose of defending its interest in the property attached, and the case then proceeded to hearing on the issues raised by the State's request for dismissal of the petition to quash the writ of attachment and by its request for judgment against the appellant in the short note case and for a final judgment of condemnation against the station wagon attached, and by the appellant's petition to quash the writ of attachment and its plea in bar which made the same contentions as the petition. These contentions are quoted above and will not be restated.

An agreed statement was presented to the court setting forth the facts stated above (R. 10-14). After hearing argument the court denied appellant's petition to quash the writ of attachment and signed an order entering judgment against the appellant in the short note case for $363.00 with interest and costs, this being the full amount of the tax alleged to be due in connection with all of the transactions described in the agreed statement of facts (R. 33-34).

In his opinion, the trial judge (WARNKEN, J.) held (1) that the appellant had the right to defend this suit by raising the constitutional questions stated in its petition to quash the attachment above mentioned and overruled the

contention of the State that the appellant should first have resorted to administrative remedies (R. 22); (2) that the appellant was engaged in business in the State of Maryland and could be required to collect and be made liable to the State of Maryland for the use tax on tangible personal property which it delivered in Maryland by its own trucks or by common carrier (R. 32); (3) that the State of Maryland had "no jurisdiction" to require appellant to collect or be liable for the use tax on tangible personal property purchased by Maryland residents in Delaware and personally brought by such residents into Maryland (R. 32); and (4) that since the tax was valid as to some transactions, the Comptroller of the State of Maryland had the legal right to make a deficiency assessment against it and the amount of the assessment could be attacked only by pursuing the administrative and court proceedings made available by the Maryland statutes (R. 33). Accordingly, the assessment against the appellant on all sales was upheld (R. 33).

Appellant filed two appeals in the Court of Appeals of Maryland. One appeal was from the order of the court denying appellant's petition to quash and set aside the writ of attachment (R. 35). The other appeal was from the judgment entered against appellant in the short note case (R. 34). The Court of Appeals affirmed both the judgment and the order by a final order entered on March 11, 1953 (R. 45). In its opinion, the court dealt first with the contention of the State that appellant, by failing to follow the statutory administrative procedure, lost all right to attack the assessment. This contention was overruled, the court holding that the statutory procedures were inapplicable. In this connection the court said (R. 38):

> "As appellant has not been regularly conducting its business in any County of the State or in Baltimore City, within the meaning of Section 348, it could not

have followed the statutory procedure. Therefore, appellant was not precluded from challenging the validity of the assessment in the attachment case."

The Court of Appeals also held that appellant had the right to appear specially in such an attachment proceeding solely for the purpose of protecting its interest in the property attached and without subjecting itself personally to the jurisdiction of the court even though in order to protect its property it contested the validity of the State's claim (R. 43).

The Court of Appeals also dealt with appellant's contention that it was not subject to the provisions of the Maryland statute. The court held that while the appellant had not been "regularly conducting its business in any county of the State or in Baltimore City" and was not doing business in the State "within the meaning of the Foreign Corporation Law so as to subject itself to the State forum", it was nevertheless "engaged in business in this State" within the meaning of the Maryland Use Tax Law (R. 38).

The court then held that, "even acknowledging that appellant, a foreign corporation, was not subject to the State's jurisdiction," (R. 43) the assessment of the tax against appellant did not infringe Article I, Section 8, of the Constitution of the United States vesting in Congress the power to regulate commerce with foreign nations and among the several states nor violate the Due Process Clause of the Fourteenth Amendment of the Federal Constitution nor Article 23 of the Maryland Declaration of Rights which declares that "no man ought to be deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the Land." Finding that there was no valid objection to the assessment, the court affirmed the judgment entered in the short note case in favor of the State and also the

order in the attachment case denying appellant's petition to quash the attachment (R. 45).

In affirming the judgment the Court of Appeals necessarily held (contrary to the opinion of the trial court) that the State could validly assess against appellant use taxes payable by Maryland customers who bought goods from the appellant in Delaware, took delivery there and thereafter themselves brought the goods into the State of Maryland. In the trial court the assessment had been held invalid to the extent that such cases were included but judgment had been entered against the appellant nevertheless because of failure to pursue appropriate administrative remedies. The Court of Appeals did not base its affirmance on this ground — in fact it specifically held that the administrative remedies were not available to the appellant (R. 38) — but rather on the ground that the assessment was in all respects valid and lawful.

Preliminary Statement

Section 383 of the Annotated Code of Maryland* requires the vendor at the time of filing his return to "pay to the Comptroller the taxes imposed by Section 369 of this subtitle." Section 375 provides that: "Any vendor who fails to collect the tax pursuant to this sub-title and the regulations prescribed hereunder shall, in addition to all other penalties, be personally liable to the State for the amount uncollected." Section 340 (d) provides that: "When both vendor and purchaser are liable for any tax, a deficiency assessment shall be first levied against the vendor".

The suit which gives rise to this appeal is one to recover from appellant a sum of money due and owing by virtue of the fact that "the Comptroller has assessed a deficiency

* All statutes cited appear in the Appendix hereto (*infra* pp. 31-41).

in Use Tax against the Defendant [appellant] herein in the amount of $356.40 which said deficiency has become final" (R. 2). The affidavit of attachment recites that appellant "is justly and bona fide indebted unto the said State of Maryland, by reason of their failure and refusal to pay legally assessed deficiencies to the said State of Maryland, in Use Taxes justly due and owing" (R. 1). The judgment of the Superior Court of Baltimore City was entered against appellant in the full amount of the tax claimed (R. 33).

Thus the issue involved in this case is plainly one of jurisdiction to impose a tax. That issue cannot be obscured by euphemistic declarations that Maryland seeks only to impose upon appellant the duty of tax collection. If the judgment of the lower courts is affirmed, appellant will have to pay a tax imposed upon it by the State of Maryland. If the State lacks power to impose such a tax this appeal must succeed.

In *General Trading Company v. State Tax Commission*, 322 U. S. 335 (1944), this Court had before it a ruling of the Supreme Court of Iowa requiring a foreign corporation to pay a use tax on goods shipped into that state and used there by Iowa residents. In that case it appeared that the seller was engaged in the systematic solicitation of orders through salesmen who made personal calls in Iowa on prospective customers and that the property on which the use tax was laid was sent to Iowa as a result of orders so solicited. The seller voluntarily submitted to the jurisdiction of the Iowa courts and sought to challenge the application to it of the Iowa use tax statute. The Supreme Court of Iowa held that the statute applied. This court affirmed. Speaking for the majority, Mr. Justice FRANKFURTER held that Iowa might properly impose a tax on the

resident purchaser of property brought into the State even though the property came into the purchaser's possession as a result of interstate commerce. The fact that it was the non-resident seller from which Iowa was seeking to collect the tax was met with the simple assertion that "To make the distributor the tax collector for the State is a familiar and sanctioned device." (322 U. S. at 338).

This opinion left much doubt as to the scope of the court's ruling. Was the fact that the seller voluntarily submitted to the jurisdiction of the Iowa court significant? Was the continuous solicitation by salesmen in Iowa an essential factor in the court's decision? Did the court mean to say that Iowa might impose the burden of collecting the tax on transactions where no solicitation had taken place in Iowa? These and other questions remained unanswered by the opinion. See comment of Thomas Reed Powell, 57 HARV. L. R. 1086 (1944).

The taxing authorities of the various states have naturally attempted to give the broadest application to the doctrine of the *General Trading* case. See 65 HARV. L. R. 301 (1951). But this attitude on their part has met with stout resistance. Sellers whose products are sold direct to purchasers residing in many different states have been appalled at the prospect of maintaining records to fit a variety of State regulations and of submitting to inspection by a multiplicity of different taxing officials. Many of them have simply ignored all communications from out of state sales tax divisions and have gone about their business as before. JACOBY, *Retail Sales Taxation* (1938); HAIG & SHOUP, *The Sales Tax in the American States* (1934). The present case is an attempt by the taxing officials of the State of Maryland to break this impasse by seizing property of a non-resident seller — in this case a motor vehicle bear-

ing a Delaware license which happened to be found in Maryland.

Appellant submits that the *General Trading* case carried the exercise of state power to the verge of the law and that further extensions of that power cannot be tolerated without irreparable injury to the economic fabric of the nation. Specifically appellant contends that the Maryland statute as construed and applied by the highest court of that State, conflicts with the Federal Constitution in two respects:

(1) it invades the area reserved to exclusive federal jurisdiction by Section 8 of Article I;

(2) it attempts to extend the power of the State beyond its borders in violation of the Due Process Clause of the Fourteenth Amendment.

ARGUMENT

I.

The Tax Is Invalid Because It is Prohibited By The Commerce Clause Of The Federal Constitution.

No object was nearer to the hearts of the framers of the Federal Constitution than to eliminate those barriers which had been erected by the states to the freedom of movement across state borders. That it was to accomplish this object that Article I, Section 8, of the Federal Constitution gave Congress the power "to regulate commerce with foreign nations and among the several states", has been recognized since *Gibbons v. Ogden*, 9 Wheat 1 (1824). So recently as 1949 this Court stressed the significance of this constitutional history, *Hood v. DuMond*, 336 U. S. 525, 533-535 (1949). This great objective of the framers was further advanced by the adoption of Article IV, Section 2, which provided that the "citizens of each state shall be entitled

to all privileges and immunities of the citizens in the several states". *Crandall v. Nevada,* 6 Wall 35 (1868); *Colgate v. Harvey,* 296 U. S. 404 (1935); *Toomer v. Witsell,* 334 U. S. 385 (1948); and see concurring opinions in *Edwards v. California,* 314 U. S. 160 (1941). See also the interesting opinion in *Anderson v. Mullaney,* (9 Cir.) 191 F. 2d 123 (1951), affd. *Mullaney v. Anderson,* 342 U. S. 415 (1952). As the privileges and immunities guaranteed by Article IV, Section 2, (and by the Fourteenth Amendment) are limited to those of natural persons, *Liberty Warehouse Co. v. Burley T. G. Co-op M. Asso.,* 276 U. S. 71 (1928), corporations must look to the commerce clause for their protection.

Since *Cooley v. Board of Port Wardens,* 12 How. 299 (1851), it has been clear that the commerce clause does not, of its own force, prohibit all regulation by a state of movement across state borders. Thus a state may regulate the size and weight of motor cars moving into the state to insure the sane and economical use of the state's highways, *South Carolina State H. Dept. v. Barnwell Bros.,* 303 U. S. 177 (1938). It may insure the fitness and integrity of those negotiating contracts for interstate transportation by licensing them and requiring a bond to insure their good behavior, *California v. Thompson,* 313 U. S. 109 (1941). It may require those who use its highways to designate an agent upon whom process may be served in suits for damages arising out of interstate movements within the state, *Kane v. New Jersey,* 242 U. S. 160 (1916); *Hess v. Pawloski,* 274 U. S. 352 (1927); and it may impose a tax for the privilege of using its roads in interstate commerce, *Hendrick v. Maryland,* 235 U. S. 610 (1915); *Capitol Greyhound Lines v. Brice,* 339 U. S. 542 (1950). It may even require a manufacturer engaged in transporting his own products in interstate commerce to apply for a cer-

tificate of convenience and necessity provided that such a certificate will be granted as a matter of course upon payment of a nominal fee. *Fry Roofing Co. v. Wood*, 344 U. S. 157 (1952).

But this power has recognized limits. It may not be used to exact a tax for the privilege of doing interstate business, *Spector Motor Service v. O'Connor*, 340 U. S. 602, 608-609 (1951). Nor may a tax be levied "upon some local event so much a part of interstate business as to be in effect a tax upon the interstate business itself." *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 88-89 (1948), per Mr. Justice REED. Particularly offensive is any attempt of the states to exercise their regulatory power so as to protect the local economy from the effect of interstate commerce. *Buck v. Kuykendall*, 267 U. S. 307 (1925), and *Bush v. Maloy*, 267 U. S. 317 (1925), struck down attempts of the states to exclude interstate motor carriers in order to limit competition. *Baldwin v. Seelig*, 294 U. S. 511 (1935), condemned legislation prohibiting the sale within the state of milk brought into the state and bottled there for which less than a minimum price had been paid to the producer in another state. *Hood v. DuMond*, 336 U. S. 525 (1949), set aside a law which the state courts had construed to authorize denial of a permit to a corporation engaged in distributing milk across state lines to build a new milk receiving station, the purpose of the denial being to protect other local distributors from destructive competition and to insure a needed supply to the local market.

In *Baldwin v. Seelig, supra*, cited above, Mr. Justice CARDOZO, with his customary eloquence expounded the underlying purposes of the commerce clause. He said:

> "What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catch-

words are subordinate to this overmastering requirement. Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result" (294 U. S. at 527).

In *Freeman v. Hewit*, 329 U. S. 249 (1946), this Court held that the state of Indiana could not include within the scope of a gross income tax the proceeds of securities sold outside of the state. Speaking for the majority of the court, Mr. Justice FRANKFURTER said:

"It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the Commerce Clause. Of course a State is not required to give active advantage to interstate trade. But it cannot aim to control that trade even though it desires to control its own. It cannot justify what amounts to a levy upon the very process of commerce across State lines by pointing to a similar hobble on its local trade. It is true that the existence of a tax on its local commerce detracts from the deterrent effect of a tax on interstate commerce to the extent that it removes the temptation to sell the goods locally. But the fact of such a tax, in any event, puts impediments upon the currents of commerce across the State line, while the aim of the Commerce Clause was precisely to prevent States from exacting toll from those engaged in national commerce." (329 U. S. at 254).

Similarly in *McLeod v. Dilworth*, 322 U. S. 327 (1944), the court held that Arkansas lacked power to require a non-resident vendor to pay a sales tax on sales solicited in Arkansas but consummated beyond the borders of the state. Mr. Justice FRANKFURTER again speaking for the majority held that a tax on such a sale:

> "* * * involves an assumption of power by a State which the Commerce Clause was meant to end. The very purpose of the Commerce Clause was to create an area of free trade among the several States. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States." (322 U. S. at 330-331).

The tax with which we are presently concerned is not a sales tax. It is a use tax and may be exacted from him who uses the property within the state, even though the sale to the user is not in itself subject to tax, *Henneford v. Silas Mason Co.*, 300 U. S. 577 (1937). Our question relates, however, not to the power of the state to tax the user but to its power to exact that tax from the seller. Where, as in the present case, the seller is not qualified to do business in the state and is engaging in no activities in the state other than continuous interstate movement, may a state impose upon the seller liability for the use tax which concededly it might properly collect from the purchaser?

No case can be cited supporting so broad an exercise of state power. In *Monamotor Oil Co. v. Johnson*, 292 U. S. 86 (1934), the court upheld legislation requiring one who engaged in the local distribution of petroleum products to collect and pay to the state a use tax. In that case the complaining taxpayer was a foreign corporation doing business in the taxing state where it maintained storage facilities, a refinery and numerous service stations. While there is some broad language in the case, this language was in-

tended to be read in connection with the facts. This was made clear by the author of the opinion in the *Monamotor* case, Mr. Justice ROBERTS, in the dissenting opinion which he filed in *Nelson v. Sears Roebuck & Co.*, hereinafter cited.

Felt and T. Mfg. Co. v. Gallagher, 306 U. S. 62 (1939), upheld a California statute imposing a similar requirement on retailers who maintained a place of business in the state.

In *Nelson v. Sears Roebuck & Co.*, 312 U. S. 359 (1941), the Court held that a foreign corporation doing business in a state through retail stores could be compelled to act as agent for the state in the collection of a use tax on goods sold to local buyers through a separate mail-order department. Speaking for the majority Mr. Justice DOUGLAS said:

> "So the nub of the present controversy centers on the use of respondent as the collection agent for Iowa. The imposition of such a duty, however, was held not to be an unconstitutional burden on a foreign corporation in *Monamotor Oil Co. v. Johnson*, 292 U. S. 86, 78 L. ed. 1141, 54 S. Ct. 575, and *Felt & T. Mfg. Co. v. Gallagher*, 306 U. S. 62, 83 L. ed. 488, 59 S. Ct. 376. But respondent insists that those cases involved local activity by the foreign corporation as a result of which property was sold to its local customers, while in the instant case there is no local activity by respondent which generates or which relates to the mail orders here involved. Yet these orders are still a part of respondent's Iowa business. The fact that respondent could not be reached for the tax if it were not qualified to do business in Iowa would merely be a result of the 'impotence of state power.' *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, ante, 61 S. Ct. 246, 130 A. L. R. 1229, supra. Since Iowa has extended to it that privilege, Iowa can exact this burden as a price of enjoying the full benefits flowing from its Iowa business. Cf. *Wisconsin v. J. C. Penney Co.*, supra. Respondent cannot avoid that burden though its business is departmentalized. Whatever may be the inspiration for these mail

orders, however they may be filled, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa. They are nonetheless a part of that business though none of respondent's agents in Iowa actually solicited or placed them. Hence to include them in the global amount of benefits which respondent is receiving from Iowa business is to conform to business facts" (312 U. S. at 364).

We have previously referred to the case of *General Trading Company v. State Tax Commission of Iowa*, 322 U. S. 335 (1944), where a non-resident was held liable to pay a use tax on goods shipped into the state of Iowa pursuant to orders solicited by traveling salesmen. As appears from the concurring opinion of Mr. Justice RUTLEDGE (322 U. S. at 354) the record in that case supported a finding that the salesmen were engaged in continuous and regular courses of solicitation in the state of Iowa. Here, in contrast, no salesman of the appellant operated in the state of Maryland; no negotiations were conducted here, nor were any orders taken here. The only activities of appellant in Maryland were those of continuous interstate movement. Appellant used the mails to communicate with its customers; it advertised in Delaware newspapers, some copies of which crossed the state line; it broadcast in Delaware and the electronic waves did not stop at the border; it sent its trucks out from its Delaware store, storeroom or warehouse to make deliveries and crossed the state line to do so. That no tax could be imposed by the State of Maryland upon appellant for the privilege of advertising in that state by mail or radio or of delivering goods in the state by truck is clearly established by the authorities which have previously been cited. If it cannot be taxed for this privilege, upon what theory can it be made liable for taxes due from its customers? Is this not really an exaction for the privilege of doing interstate business?

Plainly enough, the non-resident seller who confines his activities strictly to Delaware could not be made liable for the use tax. If the Company were simply to cease making deliveries to customers, Maryland could assert no right to hold it liable for use taxes, even though its customers used the goods in this state. Thus the Delaware merchant who makes no deliveries across state lines is immune. We have here, then, a tax which can be avoided by the simple expedient of not engaging in interstate commerce; but is it not this very suppression of interstate movement that the use tax was designed to accomplish and the commerce clause was designed to prevent?

It may be argued that the state has the right to impose a burden on those who make deliveries within its borders, and in this connection reference may be made to a phrase appearing in the opinion in *McGoldrick v. Berwind-White Co.*, 309 U. S. 33, 58 (1940), where it was said that the tax there sustained was "conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption." See also *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U. S. 389, 393 (1952). It is not to be supposed that these few words were intended to overrule the long line of cases holding that delivery in the state pursuant to an interstate sale does not give power to impose a license tax. *Caldwell v. North Carolina*, 187 U. S. 622 (1903); *Crenshaw v. Arkansas*, 227 U. S. 389 (1913); *Stewart v. Michigan*, 232 U. S. 665 (1914). In *Wagner v. Covington*, 251 U. S. 95, 100-101 (1919), the court said:

> "It is indisputable, that with respect to the goods occasionally carried upon plaintiffs' wagon from one state to the other in response to orders previously received at their place of business in Cincinnati, plaintiffs are engaged in interstate commerce not subject to the licensing power of the Kentucky municipality."

In referring to "local activity" in the *Berwind-White* case, Mr. Justice STONE no doubt had in mind the fact amply established by the record in that case that the seller had a sales office in New York City and that all the contracts with the New York customers in question were solicited there (309 U. S. at 44). This was also true in the companion cases of *McGoldrick v. Felt & T. Mfg. Co.* and *McGoldrick v. DuGrenier*, 309 U. S. 70, 76-77 (1940).

It is always possible to select some step in an interstate transaction and to characterize it as local. In *Nippert v. Richmond*, 327 U. S. 416 (1946), this court held, ratifying a long line of previous decisions, that the city of Richmond could not exact a license tax from one engaged in soliciting interstate business. There also counsel invoked the language of the *Berwind-White* opinion cited above. Speaking for this Court, Mr. Justice RUTLEDGE replied as follows:

> "Appellee's rationalization takes only partial account of the reasoning and policy underlying the Berwind-White decision and its differentiation of the drummer authorities. If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes places within the confines of the states and necessarily involves 'incidents' occurring within each state through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic

process particular phases or incidents, label them as 'separate and distinct' or 'local,' and thus achieve its desired result.

"It has not yet been decided that every state tax bearing upon or affecting commerce becomes valid, if only some conceivably or conveniently separable 'local incident' may be found and made the focus of the tax. This is not to say that the presence of so-called local incidents is irrelevant. On the contrary the absence of any connection in fact between the commerce and the state would be sufficient in itself for striking down the tax on due process grounds alone; and even substantial connections, in an economic sense, have been held inadequate to support the local tax. But beyond the presence of a sufficient connection in a due process or 'jurisdictional' sense, whether or not a 'local incident' related to or affecting commerce may be made the subject of state taxation depends upon other considerations of constitutional policy having reference to the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce." (327 U. S. at 423-424).

Stated in another way the real question is whether the local event is so much a part of interstate business that a tax upon it is in effect a tax upon the interstate business itself. See the opinion of Mr. Justice REED in *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 88-89 (1948).

Maryland argues that delivery is just as much local activity as solicitation. It contends that *Wagner v. Covington, supra,* and the other cases holding the states powerless to license merchants engaged in making deliveries across the state borders are distinguishable here, just as the long line of cases culminating in *Nippert v. Richmond, supra,* which forbade the states to exact license taxes from those whose salesmen solicit orders from within the state, were distinguished in the *General Trading Company* case. But

Nippert v. Richmond, supra, at 421-425 and *Breard v. Alexandria,* 341 U. S. 622, 638 (1951), make it very clear that the states are prohibited from licensing those whose traveling salesmen solicit orders for goods within the state not because those activities are lacking in local quality but because such a tax is inherently discriminatory. In contrast, the reason for prohibiting the tax on transactions where deliveries are made within the state is, as pointed out in *Wagner v. Covington* (251 U. S. at 103) that "the transportation of plaintiffs' goods across the state line is of itself interstate commerce."

The State argues that there is no difference between regular solicitation by salesmen operating within the borders of the state and solicitation by the use of the mails to the extent shown in the record in the case at bar. In that connection it should be borne in mind that appellant's mail solicitation was not addressed specifically to its Maryland customers. In fact the periodic mailing of advertising matter was by an automatic card-mailing system based on appellant's list of former purchasers and regardless of the state of residence. To compare this use of United States mails to persistent and continuous operations of salesmen who go from door to door within the State is, it is submitted, to overlook the cardinal feature of this case, namely, that here, unlike *General Trading Company* or any other previously decided case, the taxpayer is engaged in no activities in the State except movement by mail or interstate highways.

Thus we come back to the crucial question, whether delivery by common carrier or in the seller's own trucks constitutes a basis for the imposition of liability on the seller to pay the use tax. In both cases the seller is merely employing an existing channel of interstate commerce; in

the one, a common carrier, and in the other, an interstate highway. It does not appear how the ownership of the truck engaged in travel between Wilmington and a point in the State of Maryland could be material in determining whether goods are being transported in interstate commerce. We respectfully submit that the Federal Constitution forbids the State of Maryland to condition the use of the mails or the highways or any other channel of interstate commerce in the manner herein attempted.

The State argues that since appellant is entitled by the statute (Annotated Code of Maryland, Art. 81, Sec. 384) to withhold 3% of the tax to cover the expense of collection and remittance, the case is governed by the decision of this Court in *Colorado National Bank of Denver v. Bedford*, 310 U. S. 41 (1940). That case added nothing to the law established in *First National Bank v. Kentucky*, 9 Wall. 353 (1870). Both cases involved statutes which made national banks liable for taxes owed by somebody else; in the *Bedford* case, by the holders of safe deposit boxes, in the *Kentucky* case, by holders of the company's capital stock. To the argument advanced in the *Kentucky* case that such an imposition on a national bank fell afoul of the doctrine of *McCulloch v. Maryland*, 4 Wheat. 316 (1819), Mr. Justice MILLER replied as follows:

> "* * * The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. *That limitation is, that the agencies of the Federal Government are only exempted from state legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government.* Any other rule would convert a principle founded alone in the necessity of securing to the Government of the United States the means of exercising its legitimate powers, into an unauthorized and

unjustifiable invasion of the rights of the States. The salary of a federal officer may not be taxed; he may be exempted from any personal service which interferes with the discharge of his official duties, because those exemptions are essential to enable him to perform those duties. But he is subject to all the laws of the State which affect his family or social relations, or his property, and he is liable to punishment for crime, though that punishment be imprisonment or death. So of the banks. They are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the Nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. *It is only when the state law incapacitates the banks from discharging their duties ot the government that it becomes unconstitutional.* We do not see the remotest probability of this, in their being required to pay the tax which their stockholders owe to the State for the shares of their capital stock, when the law of the Federal Government authorizes the tax." 9 Wall. at 362. (Emphasis supplied.)

Nothing in the bank cases can have any bearing on the questions presented by the present appeal. Appellant's objection to paying the Maryland Use Tax is not based only on its onerous effect but on its invalidity as a direct tax on interstate commerce. In such case, the amount of the tax is immaterial. *Spector Motor Service v. O'Connor*, 340 U. S. 602, 608-609 (1951). "Of course, a State tax on interstate commerce does not become a valid one merely because 'it's only a little one' ". Per FRANKFURTER, J., in *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 103-104 (1948).

However, it is a fact that the provisions of the Maryland Use Tax Act do impose a heavy burden upon the hapless

seller. Under Sections 380 and 381 he must file monthly returns to the Comptroller.* Section 383 imposes upon him the duty of regular remittance. Section 386 empowers the Comptroller to require him to give a surety company bond or in lieu thereof Section 387 permits him to deposit securities or cash. Section 390 requires him to obtain a license cancellable under Section 392 by the Comptroller for cause. Section 392 likewise requires that he pay a license fee which is, however, nominal. Section 391 requires him to file a statement when filing his application for license and, finally, Section 393 subjects him to a fine in the event he makes deliveries in the State without having obtained the license as required by Section 390.

Sections of the Sales Tax Law which are applicable to the seller who is subject to the use tax should likewise be considered. Among these are Section 340, imposing penalties for the failure to file a return; Section 341, imposing penalties for the filing of an incorrect return; Section 353, requiring the maintenance of complete and accurate records subject to the Comptroller's control and requiring their preservation for a period of three years; and finally Section 365, imposing heavy penalties for wilful failure to keep the records, file returns or file correct returns.

II.

The Tax Is In Conflict With The Fourteenth Amendment To The Constitution.

The decision of the Court of Appeals appears to be unique in its attempt to extend the jurisdiction of the State over non-residents. The Maryland court held that appellant might be held liable for the collection of the use tax from

* All statutes cited appear in the Appendix hereto (*infra* pp. 31-41).

its Maryland customers "even acknowledging that appellant, a foreign corporation, was not subject to the State's jurisdiction" (R. 43).

In holding that Maryland might exact from appellant a use tax on goods delivered to its customers over the counter in the State of Delaware, the Court of Appeals took a step which is without precedent. We have been able to find no case presenting such a question to this or any other court, but the analogy of *Norton Company v. Department of Revenue*, 340 U. S. 534 (1951), is instructive. There Illinois was held without power to include within the measure of its gross receipts tax the proceeds attributable to orders sent directly by Illinois customers to the seller's home office in Massachusetts where the goods ordered were shipped directly to the customer by the seller. At the same time the court held that Illinois might include within the measure of the tax the proceeds of sales that utilized the seller's Chicago place of business in receiving the orders or distributing the goods. The argument advanced by a minority of this Court that all of the proceeds of petitioner's sales in Illinois could reasonably be attributable to the company's local activities was rejected. So here, even if it might be argued that the local activities are sufficient to meet the test of due process in those cases where appellant makes deliveries within the state, this would not warrant Maryland in taxing transactions where no such deliveries are made.

Cases such as *Nelson v. Sears Roebuck Company*, 312 U. S. 359 (1941), and *Nelson v. Montgomery Ward & Co., Inc.*, 312 U. S. 373 (1941), are plainly distinguishable. In those cases the taxpayers involved were qualified to do business in Iowa (the taxing state) and were operating retail stores there. This Court held that Iowa might rightly

assume that mail-order orders from its residents were "not unrelated to respondents' course of business in Iowa" (312 U. S. at 364). In the *Norton* case the Court held that there was no warrant for a similar assumption. The record in the case at bar presents far less reason for such an assumption than the record in the *Norton* case.

Moreover, it is certainly a matter of grave doubt whether the mere fact of delivery by the appellant standing alone is sufficient to warrant the imposition of a tax where the appellant is conceded to be "not subject to the State's jurisdiction". As Mr. Justice RUTLEDGE pointed out in *Nippert v. Richmond,* 327 U. S. 416, 423 (1946), "even substantial connections, in an economic sense, have been held inadequate to support the local tax". He cited as "the latest instance" the case of *McLeod v. Dilworth,* 322 U. S. 327 (1944), where persistent and systematic solicitation within the state by salesmen employed by the seller was held insufficient to warrant the imposition of a sales tax.

It is true that substantial inroads have been made on the doctrine of *Pennoyer v. Neff,* 95 U. S. 714 (1878). *International Shoe Co. v. Washington,* 326 U. S. 310 (1945), held that the employment of eleven to thirteen salesmen within the state who occasionally rented, at the seller's cost, space for the display of their wares, afforded a sufficient basis to make the seller amenable to proceedings in the courts of the state to recover unpaid contributions to the state unemployment compensation fund. The furthest extension of that doctrine is certainly the decision of this Court in *Travelers Health Asso. v. Virginia,* 339 U. S. 643 (1950), where this Court held that Virginia might bar an insurance company from selling insurance in the state through the mails unless the company designated a statutory agent to accept service of process in suits based on

such policies. The peculiar nature of insurance and the vulnerability of policyholders was thought by a majority of this Court to warrant the state taking steps to give reality to the rights which the policies pretended to give. Mr. Justices REED, FRANKFURTER, JACKSON and MINTON dissented.

Here we are dealing with no helpless policyholder but with the State of Maryland which has ample authority to collect this use tax from its own residents. For the sake of convenience the State has chosen instead to attempt to reach out beyond its borders to impose burdens on those who transact interstate commerce. By using the process of attachment the State has attempted to force non-residents to open their books to the inspection of foreign taxing officials, to submit to the regulations issued by the Comptroller of the State of Maryland and to act as a collecting agent for a state to whose jurisdiction they are admittedly not subject. Here we have essentially that "impotence of state power" which, as Mr. Justice FRANKFURTER pointed out in *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444 (1941), flows from the Constitution itself. Here as there, "the state power has nothing on which to operate."

CONCLUSION

The use tax is in essence a sort of protective tariff and in permitting the states to invoke such measures this court has tolerated a considerable breach in the dike which the Commerce Clause erected against the forces which press for economic autarchy. CRIZ, *The Use Tax: Its History, Administration and Economic Effects*, 4 Pub. Admin. Serv. 43 (1941). As always in such cases, the breach tends to widen and it is submitted that the most vigilant care is needed if a fundamental objective of the Constitution is

not to be lost. The judgment of the Court of Appeals of Maryland should be reversed.

Respectfully submitted,

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APPENDIX*

Excerpts from Article 81 of the Annotated Code of Maryland (1951 ed.), entitled "Revenue and Taxes"

Sub-title "Retail Sales Tax Act".

"Failure to File Returns: Incorrect Returns"

"340. [*280*] (a) Whenever a taxpayer fails to file any return and/or pay the tax when due as required by this sub-title, there shall be assessed against him a penalty of ten percent (10%) of the tax due, plus interest at the rate of one-half of one percent (½ of 1%) per month or fraction of a month from the time the tax was due until paid.

"(b) If the failure to file any return is due to an attempt to defraud, then the penalty shall be, in lieu of the penalty more specifically provided for by sub-section (a) of this section, one hundred percent (100%) of the tax due, plus interest at the rate of one percent (1%) per month or fraction of a month from the time the tax was due until paid.

"(c) Any taxpayer who fails to file proper returns and pay the tax due with penalty and interest within ten (10) days of receiving notice from the Comptroller advising him of his delinquency, shall in addition to the foregoing penalty be assessed a penalty of twenty-five percent (25%) of the tax due.

"(d) When both vendor and purchaser are liable for any tax, a deficiency assessment shall be first levied against the vendor, but such assessment shall not be considered an election of remedies nor bar an assessment against the purchaser for the same tax or part thereof unpaid by the vendor.

"(e) All amounts received from any taxpayer shall be credited first to penalty and interest accrued and then to the tax due."

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* The italicized section numbers in brackets are those of the 1947 Cumulative Supplement to the 1939 Code.

"341. [*281*] Whenever the Comptroller shall find from an examination of the returns or records of any taxpayer or otherwise that such taxpayer has theretofore filed an incorrect return and paid less than the amount of the tax due under this sub-title, he shall levy a deficiency assessment against such taxpayer. Such assessment shall include the amount of such deficiency, as found by the Comptroller, plus one of the following amounts:

"(1) If the Comptroller finds that the deficiency was not due to an attempt to defraud, there shall be added a penalty of ten percent (10%), plus interest at the rate of one-half of one percent (½ of 1%) per month or fraction of a month from the time the tax was due until paid.

"(2) If the Comptroller finds that any part of the deficiency is due to fraud with an attempt to evade the tax, there shall be added a penalty of one hundred percent (100%), and interest at the rate of one percent (1%) per month or fraction of a month from the time the tax was due until paid.

"(a) Any taxpayer who fails to file correct returns and pay the tax due with penalty and interest within ten (10) days of receiving notice from the Comptroller advising him of the amount of his deficiency, shall in addition to the foregoing penalties be assessed a penalty of twenty-five percent (25%) of the tax due.

"(b) All amounts received from any taxpayer shall be credited first to penalty and interest accrued and then to the tax due.

"(3) Whenever any person who has been found to be either delinquent or deficient as defined in Sections 340 and 341 of this sub-title fails to file a proper return within ten (10) days of notice or demand by the Comptroller, the Comptroller shall determine the taxable sales of such taxpayer for the period or periods involved and compute the tax from the best information available. Such determination and/or computation shall be prima facie correct."

"Records; Investigations and Hearings"

"353. [*293*] (a) Each vendor shall keep complete and accurate records of all taxable sales, together with a record of the tax collected thereon, and shall keep all invoices, bills of lading and such other pertinent records and documents in such form as the Comptroller may, by regulation, require. Such records and other documents shall be open at any time during business hours for inspection and examination by the Comptroller or any of his authorized representatives and shall be preserved for a period of three (3) years unless the Comptroller shall in writing consent to their destruction within that period or by order require that they be kept longer.

"(b) Whenever any taxpayer fails to keep records from which the tax imposed by this subtitle may be accurately computed, the Comptroller may make use of a factor developed by surveying other taxpayers of the same type or otherwise compute the amount of tax due and this computation shall be prima facie correct."

"354. [*294*] (a) For the purpose of enforcing the provisions of this sub-title the Comptroller or any duly authorized agent or representative designated by him:

"(1) May conduct investigations and hold hearings concerning any matter covered by this sub-title at any time or place within the State of Maryland;

"(2) In the conduct of any investigation or hearing, may require by subpoena or summons the attendance and testimony of witnesses and the production of any books, accounts, records, papers and correspondence relating to any matter, which the Comptroller is authorized by this subtitle to determine;

"(3) May sign subpoenas, administer oaths and affirmations, examine witnesses and receive evidence.

"(b) In case of disobedience of any subpoena or the contumacy of any witness appearing before the Comptroller

or his duly authorized agent or representative, the Comptroller may apply to the Circuit Court of any of the counties or to the Baltimore City Court for an Order. Such Court may thereupon issue an Order requiring the person subpoenaed to obey the subpoena or to give evidence or produce books, accounts, records, papers and correspondence touching the matter in question. Any failure to obey such order of Court, may be punished by such Court as a contempt thereof."

"Penalties"

"365. [*305*] Any taxpayer or any officer of a corporate taxpayer

"(a) who wilfully fails to collect the tax imposed by this sub-title in accordance herewith; or

"(b) who wilfully fails to pay over the tax imposed by this sub-title in accordance herewith; or

"(c) who wilfully fails to file any return required by this sub-title; or

"(d) who makes any wilfully false statement or misleading omission in any return pursuant to this sub-title; or

"(e) who wilfully fails to keep records in accordance with this sub-title and any regulations of the Comptroller pursuant hereto, shall be guilty of a misdemeanor and upon conviction shall be fined not more than One Thousand Dollars ($1,000.00) or imprisonment for not more than one year, or both."

Sub-title "Maryland Use Tax".

"368. [*308*] (Definitions) As used in this sub-title, the following terms shall mean or include:

* * * * * *

"(k) 'Engaged in business in this State' means the selling or delivering in this State, or any activity in this State in connection with the selling or delivering in this State, of tangible personal property for use, storage or consumption within this State. This term shall include, but shall not be limited to the following acts or methods of transacting business.

"(1) The maintaining, occupying or using, permanently or temporarily, directly or indirectly, or through a subsidiary or agent, by whatever name called, of any office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business.

"(2) The having of any representative, agent, salesman, canvasser, or solicitor operating in this State for the purpose of selling, delivering, or the taking of orders for any tangible personal property."

* * * * * *

"369. [*309*] (Imposition of tax). An excise tax is hereby levied and imposed on the use, storage or consumption in this State of tangible personal property purchased from a vendor within or without this State on or after the effective date of this Act, for use, storage or consumption within this State. The tax imposed by this section shall be paid by the purchaser and shall be computed as follows:

"(a) On each sale where the price is from fifty-one cents (51¢) to one Dollar ($1), both inclusive, two cents (2¢).

"(b) On each fifty cents (50¢) of price or fraction thereof in excess of One Dollar ($1), one cent (1¢)."

"Collection of Tax"

"371. [*311*] Every vendor engaging in business in this State and making sales of tangible personal property for use, storage or consumption in this State which are taxable under the provisions of this sub-title, at the time of making such sales, or if the use, storage or consumption is not then taxable hereunder, at the time when such use, storage or consumption becomes taxable hereunder, shall collect the tax imposed by this sub-title from the purchaser."

"373. [*313*] Every vendor required or permitted to collect the tax shall collect the tax imposed by the provision of this sub-title, notwithstanding the following:

"(a) That the purchaser's order or the contract of sale is delivered, mailed, or otherwise transmitted by the purchaser to the vendor at a point outside of this State as a result of solicitation by the vendor through the medium of a catalog or other written advertisement; or

"(b) That the purchaser's order or contract of sale made or closed by acceptance or approval outside of this State or before said tangible personal property enters this State; or

"(c) That the purchaser's order or contract of sale provides that said property shall be, or it is in fact, procured or manufactured at a point outside of this State and shipped directly to the purchaser from the point of origin; or

"(d) That said property is mailed to the purchaser in this State from a point outside this State or delivered to a carrier at a point outside this State, F. O. B., or otherwise, and directed to the vendor in this State, regardless of whether the cost of transportation is paid by the vendor or by the purchaser; or

"(e) That said property is delivered directly to the purchaser at a point outside this State, if it is intended to be brought to this State for use, storage or consumption in this State."

"374. [*314*] The tax to be collected as provided in this sub-title shall be stated and charged separately from the sale price and shown separately from the sale price on any record thereof at the time when the sale is made or at the time when evidence of the sale is issued or employed by the vendor. The tax shall be paid by the purchaser to the vendor, as trustee for and on account of the State, and the vendor shall be liable for the collection thereof for and on account of the State."

"375. [*315*] The vendor and any other officer of any corporate vendor required or permitted to collect the tax imposed by this sub-title shall be personally liable for the tax collected, and such vendor shall have the same right in respect to collecting the tax from the purchaser, or in respect to non-payment of the tax by the purchaser, as if the tax were a part of the purchase price of the property and payable at the time of the sale. Any vendor who fails to collect the tax pursuant to this sub-title and the regulations prescribed hereunder shall, in addition to all other penalties, be personally liable to the State for the amount uncollected."

"376. [*316*] The tax hereby imposed shall apply and be collected by the vendor required or permitted to collect the tax imposed by this sub-title from the purchaser at the time the sale is made regardless of the time when the purchase price is paid and delivered; unless the Comptroller shall provide by regulation in the case of credit or installment sales for the payment of the tax upon collection of the price or installments of the price or at some other time."

"379. [*319*] For the purpose of the proper administration of this sub-title and to prevent evasion of the tax and the duty to pay the same as herein imposed, it shall be presumed that the tangible personal property sold by any person for delivery in this State, however made or carried, is sold for use, storage or consumption in this State. A like presumption shall apply to all tangible personal property delivered without this State and brought into his State by the purchaser thereof. The presumption contained in this

section may be overcome if the purchaser shall have in his possession a certificate, in such form as the Comptroller may prescribe, evidencing the fact that the tangible personal property was not sold for use, storage or consumption in his State as those terms are defined in Section 368 of this sub-title."

"Returns and Payment of Tax"

"380. [*320*] Before the fifteenth day of August, 1947, and before the fifteenth day of each calendar month thereafter, every vendor engaging in business in this State and every vendor not engaging in business in this State but who, upon application to the Comptroller, has been expressly authorized to collect the tax, shall make a return to the Comptroller, covering the preceding calendar month. The Comptroller may permit or require such returns to be made for other periods and upon such other dates as he may by regulation specify."

"381. [*321*] The form of returns required to be filed by Section 380 of this sub-title shall be prescribed by the Comptroller and shall contain such information as he may deem necessary for the proper administration of the tax. Such returns shall show, among other things the aggregate value of the tangible personal property sold by the vendor, the use, storage or consumption of which became subject to the tax imposed by this sub-title during the period of time covered by the return."

"382. [*322*] Before the fifteenth day of August, 1947, and before the fifteenth day of each calendar month thereafter, every person purchasing tangible personal property, the use, storage or consumption of which is subject to the tax imposed by this sub-title, and who has not paid the tax imposed by this sub-title to a vendor required or authorized to collect the same, shall make a return to the Comptroller covering the preceding calendar month. The Comptroller may permit or require such returns to be made for other periods and upon such other dates as he may by regulation specify. Such returns shall show the value of the tangible personal property purchased by such person, the use, stor-

age or consumption of which became subject to the tax imposed by this sub-title during the period of time covered by the return."

"383. [323] At the time of filing the returns as specified in Section 380 and 382 of this sub-title, the vendor or person so filing said returns shall pay to the Comptroller the taxes imposed by Section 369 of this sub-title."

"384. [324] The vendor or person subject to tax as provided in this sub-title shall be entitled to apply and credit against the amount of tax payable by him as stated in Section 383, an amount equal to three per cent (3%) of the gross tax to be remitted to the Comptroller to cover the expense in the collection and remittance of said tax; provided, however, that nothing contained in this section shall apply to any vendor or person who shall fail or refuse to file his return with the Comptroller within the time prescribed by Sections 380 and 382 of this sub-title."

"386. [327] Where the Comptroller, in his discretion, deems it necessary to protect the revenues to be obtained under the provisions of this sub-title, he may require any taxpayer [to] file with him a bond issued by a surety company authorized to do business in this State and approved by the State Insurance Commissioner as to solvency and responsibility, in such amounts as the Comptroller may fix to secure the payment of any tax or penalties due or which may become due from such taxpayer. In the event that the Comptroller determines that a taxpayer is to file such a bond, he shall give notice to such taxpayer to that effect, specifying the amount of the bond required. The taxpayer shall file such bond within five (5) days after the giving of such notice unless within such five (5) days the taxpayer shall request in writing a hearing before the Comptroller, at which hearing the necessity, propriety and amount of the bond shall be determined by the Comptroller. Such determination by the Comptroller shall be final and shall be complied with within fifteen (15) days after the taxpayer is given notice thereof."

"387. [328] In lieu of the bond required by Section 386 of this sub-title, securities approved by the Comptroller or cash in such amount as he may prescribe may be deposited, which shall be kept in the custody of the Comptroller, who may at any time, without notice to the depositor, apply them to any tax and/or interest or penalties due, and for that purpose the securities may be sold by the Comptroller at public or private sale without notice to the depositor."

"Registration"

"390. [331] Every vendor engaged in business in this State except those registered under Section 356 of this Article, who shall sell or deliver tangible personal property for use, storage or consumption in this State shall obtain a license for the privilege of engaging in said business. Such person shall apply for the license required by this section within sixty (60) days from and after July 1, 1947."

"391. [332] Each applicant for a license required by Section 390 of this sub-title shall on or before the first day of August, 1947, make out and deliver to the Comptroller, upon a blank to be furnished by him for that purpose, a statement showing the name of the applicant, the name and addresses of all agents of the applicant operating within this State, the location of any and all distribution houses or other places of business of the applicant in this State, and such other information as the Comptroller may prescribe."

"392. [333] At the time of making his application as required by Section 391 of this sub-title, the applicant shall pay to the Comptroller a license fee in the sum of One Dollar ($1). Upon receipt of such application and the fee as herein prescribed, the Comptroller shall issue to the applicant a license authorizing the applicant to sell or deliver tangible personal property for use, storage, or consumption in this State. The license shall be non-transferrable except as otherwise provided in the sub-title and shall be displayed in the applicant's place of business. Except as otherwise provided in this sub-title, the license issued

as herein provided shall continue valid until surrendered by the vendor or cancelled for cause by the Comptroller. The form of such license shall be as prescribed by the Comptroller."

"393. [334] Whoever engages in business in this State, except those registered under Section 355 of this Article, who shall sell or deliver tangible personal property for use, storage or consumption in this State without having a license as provided in Section 390 of this sub-title shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than Twenty-five Dollars ($25.00) nor more than One Hundred Dollars ($100.00)."

"Applicability of Other Sections"

"394. [335] All provisions not inconsistent with the provisions of this sub-title in Sections 340 and 341 of this Article relating to failure to file returns and incorrect returns; in Sections 343-346, both inclusive, of this Article relating to refunds; in Sections 347 and 348 of this Article relating to revisions and repeals;* in Sections 353-355, both inclusive, of this Article relating to records, investigations and hearings; in Section 361 of this Article relating to general powers of the Comptroller; in Sections 363-364, both inclusive, relating to general provisions; in Section 365 of this Article relating to penalties; and in Section 366 of this Article relating to disposition of proceeds are hereby made a part of this sub-title and shall be applicable hereto."

* The word "appeals" evidently intended.